81-2391

NO.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RICHARD J. KNAPP,

Petitioner,

-vs.-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether Petitioner was denied a fair and impartial trial due to the preclusion of evidence bearing on defense witness Torina's bias and motive to testify falsely, which preclusion was upheld by the Court of Appeals in spite of the sworn affidavits of two jurors directly contradicting and impeaching the rationale of said decision?

2. Whether the Trial Court's jury instruction on embezzlement was erroneous and confused the issues of tax fraud and evasion rightfully before the jury?

3. Whether in a Specific Item tax fraud and evasion prosecution should net worth and expenditures evidence be admissible without Government compliance with certain safeguards?

4. Whether the standard of judicial conduct was breached by the numerous remarks of the Trial Judge bearing on the veracity and credibility of Petitioner and defense witnesses and by 30 sua sponte rulings favorable to the prosecution.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Opinion Below	1
Jurisdiction of This Court	2
Constitutional Provisions and Statute Involved in the Case	2
Statement of the Case	3
Reasons for Granting the Writ	6
I. The Rationale of the Court of Appeals, in Upholding the Preclusion of Evidence Bearing on Defense Witness Torina's Bias and Motive to Testify Falsely, Was Directly Contradicted and Impeached by the Sworn Affidavits of Two Jurors	6
II. The Trial Court's Jury Instruction on Embezzlement Was Erroneous and Confused the Issues of Tax Fraud and Evasion Rightfully Before the Jury	8
III. In A Specific Item Tax Fraud and Evasion Prosecution Evidence of Net Worth and Expenditures Should Not Be Admissible Unless the Government Complies With Certain Safeguards	10

IV. The Standard of Judicial Conduct Was Breached by Numerous Remarks By the Trial Judge Bearing on the Veracity and Credibility of Petitioner and Defense Witnesses and by Thirty Sua Sponte Rulings Favorable to the Prosecution 12

Conclusion 16

TABLE OF AUTHORITIES

Page

Cases Cited:

Davis v. Alaska, 415 U.S. 308 (1974) 7,8

Holland v. U.S., 348 U.S. 121 (1954) 10,11

Quercia v. U.S., 289 U.S. 466 (1933) 12,14

Stirone v. U.S., 361 U.S. 212 (1960) 9

Taglianetti v. U.S., 398 F.2d 558 (1st Cir. 1968) aff'd, 394 U.S. 316 (1969) 10

U.S. v. Campbell, 426 F.2d 547 (2d Cir. 1970) 8

U.S. v. Catalano, 491 F.2d 268 (2d Cir.), *cert. den.* 419 U.S. 825 (1974) 8

U.S. v. Clark, 475 F.2d 240 (2d Cir. 1973) 9

U.S. v. Curcio, 279 F.2d 681 (2d Cir. 1960) 14

U.S. v. Nazzaro, 472 F.2d 302 (2d Cir. 1973) 14

Constitution:

Constitution of the United States

Fifth Amendment 2

Sixth Amendment 2,15

Statutes:

Title 26 U.S.C., Section 7201 2

Title 26 U.S.C., Section 7206(1) 3

Appendices:

Appendix A — Indictment 1a

Appendix B — Judgment of Conviction 6a

Appendix C — Unreported Opinion of Court of Appeals 9a

Appendix D — Order of Court of Appeals Denying Petition for Rehearing and Rehearing En Banc 12a

Appendix E — Order of Court of Appeals Denying Motion for Stay of Issuance of Mandate 14a

Appendix F — Letter from Clerk of Supreme Court Denying Application for Stay 17a

Appendix G — Bill of Costs to be Included in Judgment 19a

Appendix H — Affidavit of Ruth Lauterstein 23a

Appendix I — Affidavit of Max Charmaz 24a

Appendix J — Excerpt of Trial Court's Charge to the Jury 25a

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, in the above entitled case.

OPINION BELOW

The opinion of the Court of Appeals (Appendix C, *infra*) is not reported.

JURISDICTION

The judgment of the Court below was entered on April 23, 1982. (Appendix C, *infra*). A timely petition for rehearing and rehearing en banc was denied on June 9, 1982. (Appendix D, *infra*).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

1. Constitution of the United States, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . .

2. Constitution of the United States, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

3. United States Code, Title 26, Section 7201:

> Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof,

shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

4. United States Code, Title 26, Section 7206(1):

(1) Declaration under penalties of perjury. — Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

STATEMENT OF THE CASE

Petitioner, Richard J. Knapp, was charged with failing to report $10,589.00 of income for the year 1977 and $6,410.00 for 1978, in violation of Title 26, USC §7206(1). Petitioner was also charged with owing a total of $6,722.00 in taxes to the Internal Revenue Service for the years 1977 and 1978 from said unreported income, in violation of Title 26, USC §7201.

Petitioner was employed by NBC from May, 1973, to March 15, 1979, as a Unit Manager. As a Unit Manager he was responsible for the coordination of all facilities and services for the production of television network programs, such as golf tournaments, football games and special events. Most expenses were paid at the remote location through an invoice system.

The Government's principal witnesses at trial were vendors who had done business with NBC at remote locations.

Several vendors produced records which reflected business transactions conducted with NBC through Petitioner. Four vendors did not produce the appropriate records and testified from memory as to the goods and services they provided NBC.

The Government introduced the expense vouchers of Petitioner which dealt with golf tournaments and football games during 1977 and 1978. The amounts reflected on said expense vouchers exceeded the amount of goods and services provided by the vendors, according to their testimony and records.

The Knapps bought a house in East Hampton in 1977 for $42,000. There is a $30,000 mortgage on the house. The Knapps spent $3,000 to $4,000 in furnishings in 1977.

In 1978, Knapp set up a film company of his own and operated the company at a loss, totalling $16,174. The majority of these business expenses were paid in cash to union people working evenings and weekends. The Knapps had a maid in 1977 and 1978.

On rebuttal, the Government called former Unit Manager, James Huie, to testify. Huie had recently signed a non-prosecution agreement. He testified that he stole money from NBC and that Petitioner told him that he inflated receipts to steal money also. He also stated that the Knapps had a well-stocked bar, large bookcases, and a couple of three-quarter inch video tape machines.

Defense

Petitioner disputed the testimony of five vendors: Willie McCoy, Forest Oaks Country Club, Onion Creek Country Club, Chester's Bakery and Lynn Catering. Joseph Torina, a former Unit Manager, and Co-Unit Manager with Petitioner on many of the events in question, corroborated much of what Petitioner testified took place between him and said vendors. Four of these vendors could not produce records to substantiate their testimony.

As to receipts in general, Petitioner was compelled to sign vendors' names to receipts, itemize goods and services rendered and mark them "paid" to comply with Unit Manager standards for receipts.

The reasons therefor were often due to the exigencies inherent to the job and the circumstances encountered, Unit Managers were often not able to obtain a receipt. Receipts were lost occasionally or otherwise deemed unacceptable pursuant to Unit Manager standards.

Petitioner admitted that receipts from several vendors had been inflated. The difference between the altered receipts and the actual expenditure were used to cover regularly incurred non-voucherable expenses.

Pursuant to an accepted system that existed at NBC for many years, Unit Managers incurred necessary and expected non-voucherable expenses while carrying out NBC purposes. This system maintained good relations among the entire crew, obtained cooperation and special favors from vendors, and, generally treated key people, involved with an NBC production, in a special way.

Petitioner admitted increasing the amounts on certain receipts to cover his non-voucherable expenditures. These expenditures were in line with the standard operating procedures at NBC, as corroborated by Torina, Koiv, Rutlege and even Government witness Huie to some extent, all former Unit Managers.

For example, Petitioner purchased tickets and souvenirs for hotel personnel from whom NBC frequently received favors; he bought food, liquor, fruit, flowers and cigarettes for NBC executives; he paid for certain damage caused by NBC personnel; he paid local police to escort talent to airports; and, he entertained those doing business with NBC and certain NBC personnel.

Petitioner's expense vouchers are conspicuously devoid of receipts for the aforementioned expenditures.

Torina corroborated the majority of Petitioner's testimony. Aavo Koiv, a former Unit Manager, John Bennett, a current NBC technical supervisor and Robert Owens, a parttime NBC employee also corroborated portions of Petitioner's testimony.

Hence, Petitioner spent the money not for himself, but for NBC purposes.

Reasons for Granting the Writ

I

THE RATIONALE OF THE COURT OF APPEALS, IN UPHOLDING THE PRECLUSION OF EVIDENCE BEARING ON DEFENSE WITNESS TORINA'S BIAS AND MOTIVE TO TESTIFY FALSELY, WAS DIRECTLY CONTRADICTED AND IMPEACHED BY THE SWORN AFFIDAVITS OF TWO JURORS.

In his defense, Petitioner called Joseph Torina, a former Unit Manager, to testify. Torina was a Co-Unit Manager with Petitioner on many of the events which were the subject of the trial herein.

Through cross-examination, the Government showed Petitioner and Torina to be partners who worked together extensively and often discussed receipts and vouchers. Torina, just weeks before Petitioner's trial, was tried and acquitted of charges which grew out of the *same* circumstances, not parallel, as noted by the Court of Appeals.

Torina's credibility and good character were also indirectly attacked by Government witness, Charles Gilman, who testified about "financial irregularities" in the Unit Managers' Department of NBC and the mass firings as a result thereof. James Huie, a Government rebuttal

witness, who signed a non-prosecution agreement, also implicated Torina in the corrupt practices of certain NBC Unit Managers.

Thus, the one and only logical inference to be drawn regarding Torina's reliability as a witness was that he had personal bias and an interest in a favorable outcome of the litigation for Petitioner. The jury was compelled to infer that, since Torina was so involved with Petitioner, if Torina assisted Petitioner in defending himself, Petitioner would do the same for Torina, once he was indicted and tried.*

The Court of Appeals, in rejecting this claim, said it was "speculative" that the "jury may have drawn inferences undermining the credibility of this defense witness in the absence of evidence of his prior acquittal."

It is a fact that the adverse inference that Torina had a motive to testify falsely was drawn by the jury. Two jurors willingly made sworn statements that they drew the deadly inference. Petitioner had a right to combat that. Since he was not given this opportunity, his key witness was rendered worthless. See affidavits of Ruth Lauterstein and Max Charmaz attached hereto. (Appendix H, *infra*, and Appendix I, infra, respectively).

The probative value of the evidence that Torina was previously indicted, tried and acquitted, as bearing on bias, prejudice and interest far out weighed any prejudice the Government might claim. *Davis v. Alaska,* 415 U.S. 308 (1974).

It was an abuse of discretion for the Trial Court to preclude testimony on this issue. The Court could have allowed the introduction of the evidence and instructed the jury that it had no relevance or bearing on Knapp's guilt nor was it dispositive of Torina's innocence. *U.S. v.*

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*Petitioner did not testify at Torina's trial.

Catalano, 491 F.2d 268 (2d Cir.), *cert. den.* 419 U.S. 825 (1974).

Strong parallels can be drawn between the issues at bar and *Davis v. Alaska, supra.* The partiality of the witness Torina was subject to exploration at trial. In denying Petitioner an opportunity to explore Torina's motives, the Court denied the jury information essential for it to make a "discriminating appraisal" of Torina's motive and bias. *U.S. v. Campbell,* 426 F.2d 547 (2d Cir. 1970).

The District Court and Court of Appeals have committed unsupportable error and have brought about a fundamental denial of Petitioner's right to a fair trial. U.S. Constitution, Amendment VI.

Petitioner respectfully posits that a clear case, calling for the exercise of this Court's power of supervision, has been made.

II

THE TRIAL COURT'S JURY INSTRUCTION ON EMBEZZLEMENT WAS ERRONEOUS AND CONFUSED THE ISSUES OF TAX FRAUD AND EVASION RIGHTFULLY BEFORE THE JURY.

Petitioner was indicted for making, subscribing and filing false tax returns for 1977 and 1978 and for attempting to evade taxes for the same years.

The Trial Court included in its instructions to the jury a charge on the issues and elements of embezzlement.

In fact, the Judge used these very words, "So in this case, before the defendant can be found to have embezzled money or funds of his employer, NBC, it must appear beyond a reasonable doubt from the evidence . . . " (Appendix J, *infra*).

Petitioner was not indicted by a Grand Jury for such

a charge, nor did he defend, or was obligated to defend, himself relative to that charge.

Indeed, the Trial Judge precluded examination into NBC's knowledge and sanction of certain practices by NBC Unit Managers in the performance of their duties. These issues would have been relevant if the charge was embezzlement. A full and fair trial of the issue of embezzlement was not, and should not have been, before the jury. Yet, the Court clearly asked the jury to decide that very issue.

The Trial Court does not have the power to, sua sponte, amend an indictment. This is violative of the U.S. Constitution, Amendment V, and the principles set forth in *Stirone v. U.S.*, 361 U.S. 212 (1960). The Court of Appeals failed to address this crucial issue.

Additionally, by so instructing the jury, the Court confused and misled the jury as to the issues before them. This instruction focused the jury's attention away from the crucial issues of the case and made it possible for Petitioner to be convicted of a crime for which he was not indicted.

As a result of the Trial Court's instruction it is unclear as to the basis upon which the jury reached its conclusion of guilt. *U.S. v. Clark*, 475 F.2d 240 (2d Cir. 1973).

III

IN A SPECIFIC ITEM TAX FRAUD AND EVASION PROSECUTION EVIDENCE OF NET WORTH AND EXPENDITURES SHOULD NOT BE ADMISSIBLE UNLESS THE GOVERNMENT COMPLIES WITH CERTAIN SAFEGUARDS.

This prosecution, according to the Government, was to be based on a specific item method of proof. However, many questions put to Petitioner, his wife and his accountant were designed to, and did, create a distorted picture of Petitioner's net worth and expenditures for the years in question.

The later two methods of proving tax fraud and evasion, cautioned Mr. Justice Clark, involve "something more than the ordinary use of circumstantial evidence." Indeed, they are so "fraught with danger" that Appellate Courts must closely scrutinize their use. *Holland v. U.S.*, 348 U.S. 121 (1954); also, *Taglianetti v. U.S.*, 398 F.2d 558 (1st Cir. 1968), aff'd, 394 U.S. 316 (1969).

Yet, the Court of Appeals decided this question of substance in a way not in accordance with applicable principles plainly stated in the aforementioned cases. In responding to this claim, the Court below sidestepped the real issue with these words:

> "Because the Government sought to establish Knapp's income tax violations by proving that he obtained specific items of unreported income rather than by inference from unexplained increase in his net worth, his claim based upon *Holland* . . . is inapposite."

A review of the record reveals that a large portion of the Government's cross-examination of Petitioner, his wife and accountant, plus the direct testimony of two

rebuttal witnesses was designed to show that the Knapps made expenditures in excess of their disposable income.

The danger and prejudice of allowing this type of questioning is self-evident. It should not be permitted without a detailed and accurate analysis by the Government of the accused's entire financial situation.

In holding that there was no error in such questioning the Court of Appeals has allowed the Government to circumvent the safeguards mandated by this Court. *Holland, supra; Taglianetti, supra.*

The tremendous leeway, accorded the Government in this area, put Petitioner in the position of having to prove his innocence. He was effectively denied his presumption of innocence. It was to safeguard against this type of perilous situation that the requisite safeguards were developed. *Holland, supra.*

Petitioner submits that what took place in the Trial Court must be corrected. Undoubtedly, in the future, the Government will opt to avoid the effort and expense of a net worth or expenditure prosecution by bringing the case under the pretense of "Specific Item" — no matter how weak their case-in-chief may be. Then, through cross-examination and rebuttal, the accused can be prejudiced by net worth/expenditure evidence. The abuse is evident herein; guidelines must be set.

IV

THE STANDARD OF JUDICIAL CONDUCT WAS BREACHED BY NUMEROUS REMARKS BY THE TRIAL JUDGE BEARING ON THE VERACITY AND CREDIBILITY OF PETITIONER AND DEFENSE WITNESSES AND BY THIRTY SUA SPONTE RULINGS FAVORABLE TO THE PROSECUTION.

Consideration by this Court is necessary on the independent ground that the holding below conflicts squarely with *Quercia v. U.S.*, 289 U.S. 466 (1933), and related cases from the Second Circuit.

The Trial Court's injudicious conduct denied Petitioner a fair trial. The Trial Judge made remarks and comments dealing directly with the veracity and credibility of Petitioner and his four key defense witnesses.

The following passages, admittedly taken out of context, are illustrative of the type of repeated colloquy that took place between the Trial Judge and Petitioner or his witnesses:

(a) To Petitioner:

Q. Are there any invoices in 1977 or 1978 that you falsified?

A. Well, falsified — that I made adjustments on, yes.

THE COURT: That you said something that wasn't true. That is what we mean when we say falsified.

THE WITNESS: Yes, sir.

THE COURT: I just want you to understand that false is something that you know is not true.

THE WITNESS: Yes, sir.

(b) To defense witness Koiv:

Q. If it was not voucherable, it was required to be submitted in another form and in another voucher, isn't that so?

A. Well, in the same voucher, but in another form, sure.

THE COURT: You mean called something else?

THE WITNESS: Correct, sir.

THE COURT: Which you knew it wasn't.

THE WITNESS: Correct, but it is a —

THE COURT: You deliberately put down a false expense?

THE WITNESS: It is not a false expense, sir. The money was spent.

THE COURT: But not for what you said it was?

THE WITNESS: Correct.

THE COURT: And that, of course, is not false.

THE WITNESS: The money was spent, sir.

And further:

THE COURT: You don't understand the difference between truth and falsehood?

THE WITNESS: All I know, sir, is that I spent money —

THE COURT: Do you understand the difference?

THE WITNESS: I have my own conception of it.

THE COURT: So do we. Go ahead.

(c) To Petitioner:

Q. Where did you keep this cash?

A. We kept some cash in a safe deposit box for the purpose of this film, that we used to accumulate. I used to turn all my checks over to my wife — she had me on an allowance, I was traveling —

THE COURT: The question is, where did you get the cash? Let's see if you can answer a question straight without all these explanations.

MR. DICKER: Your Honor, the questions are being

answered straight.

THE COURT: No, it isn't the question where he got the cash. Nobody asked about if he was traveling or what he was doing.

These types of facetious and disparaging remarks appear repeatedly throughout the record.

In response to this claim, the Court of Appeals commented, that, "While some of Judge MacMahon's comments . . . 'would better have been left unsaid', they were neither so many nor so prejudicial that Knapp was deprived a fair trial".

It is respectfully submitted that the aforesaid is an acknowledgement that the standard of judicial conduct, in the Second Circuit, has been breached. It is tantamount to an admission, that " . . . an appearance of impartiality and judicial detachment" did not " . . . prevail at all times". *U.S. v. Nazzaro,* 472 F.2d 302 (2d Cir. 1973), citing *U.S. v. Curcio,* 279 F.2d 681 (2d Cir. 1960)

Hopefully, this Court will determine that a review of the entire record is warranted. It will then become clear how pervasive the injudicious conduct was. Clearly, the Trial Judge lost sight of the tremendous impact and influence his "lightest remark" may have on a jury. *Quercia, supra.*

Additionally, the Trial Court made 30 sua sponte rulings which precluded questioning by defense counsel. The Court made only five such rulings on behalf of Petitioner. Our system of advocacy demands that a presiding judge function separately from the prosecution. The great disparity in the number of such rulings further conveyed the Trial Court's partiality to the jury.

The position taken by the Court of Appeals on these issues manifests a repudiation of the standards which this Court enunciated in *Quercia,* concerning the principles applicable to judicial conduct. This type of conduct by the

Trial Court must not be condoned. A slap on the wrist cannot suffice when a man's liberty is at stake.

Based upon the language of the Court, it is apparent that we have drifted into a gray area — the Court of Appeals characterized the Trial Judge's remarks as "neither so many nor so prejudicial". Petitioner asks, how many prejudicial remarks are enough? How prejudicial must the remarks be?

Petitioner submits that being prejudiced is somewhat like being pregnant — you either are or you are not. Once one is prejudiced by the type of remarks suffered by Petitioner herein it is impossible to receive the fair trial to which everyone is entitled. U.S. Constitution, Amendment VI

The Trial Judge himself, with his sarcastic remarks and constant intrusions into the trial, did more to undermine Petitioner's credibility than hours of cross-examination by the prosecution. One such remark, by the presiding Judge, can put an accused in such a bad light that he may never recover in the eyes of the jury. Here, such remarks were plentiful.

Petitioner suggests that it is time for this Court to clarify the standard prescribed, nearly fifty years ago, in *Querica*.

CONCLUSION

The petition for a Writ of Certiorari should be granted to review the decision of the United States Court of Appeals for the Second Circuit. Indeed, Petitioner respectfully submits that the error of the Court of Appeals is so clear and fundamental that summary reversal of the conviction is warranted.

Respectfully submitted,

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APPENDIX A — Indictment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

RICHARD J. KNAPP,

Defendant.

INDICTMENT

81 Crim. 0543

COUNT ONE

The Grand Jury charges:

On or about February 22, 1977, in the Southern District of New York, RICHARD J. KNAPP, the defendant, who was employed as a unit manager by the National Broadcasting Company, Inc., New York, New York, did unlawfully, wilfully and knowingly make and subscribe a tax return which he verified by a written declaration that it was made under penalties of perjury and which was filed with the United States Internal Revenue Service, which tax return he did not believe to be true, correct and complete as to every material matter in that the said tax return stated that the total income of RICHARD J. KNAPP for the calendar year 1976 was $20,302; whereas, as he then and there well knew, he received during the calendar year 1976 substantial other income, to wit, approximately $2,770 from false and fraudulent expense vouchers submitted by RICHARD J.

KNAPP to the National Broadcasting Company, Inc.
(Title 26, United States Code, Section 7206(1).)

COUNT TWO

The Grand Jury further charges:

On or about February 22, 1977, in the Southern District of New York, RICHARD J. KNAPP, the defendant, unlawfully, wilfully and knowingly did attempt to evade and defeat a large part of the income tax due and owing to the United States of America for the calendar year 1976, by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed to the Internal Revenue Service a false and fraudulent income tax return wherein it was stated that his taxable income for the calendar year 1976 was $17,152 and the amount of income tax due and owing thereon was the sum of $4,025; whereas, as he then and there well knew, his taxable income for the said calendar year was the sum of $19,922, upon which there was due and owing to the United States of America an income tax of $4,998.

(Title 26, United States Code, Section 7201.)

COUNT THREE

The Grand Jury further charges:

On or about March 14, 1978, in the Southern District of New York, RICHARD J. KNAPP, the defendant, who was employed as a unit manager by the National Broadcasting Company, Inc. New York, New York, did unlawfully, wilfully and knowingly make and subscribe a tax return which he verified by a written declaration that it was made under the penalties of perjury and which was filed with the United States Internal Revenue Service, which tax return he did not believe to be true, correct and com-

plete as to every material matter in that the said tax return stated that the total income of Richard and Ilana Knapp for the calendar year 1977 was $40,729; whereas, as he then and there well knew, he received during the calendar year 1977 substantial other income, to wit, approximately $10,589 from false and fraudulent expense vouchers submitted by RICHARD J. KNAPP to the National Broadcasting Company, Inc.

(Title 26, United States Code, Section 7206(1).)

COUNT FOUR

The Grand Jury further charges:

On or about March 14, 1978, in the Southern District of New York, RICHARD J. KNAPP, the defendant, who during the calendar year 1978 was married, did unlawfully, wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by himself and his wife to the United States of America for the calendar year 1977, by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed to the Internal Revenue Service a false and fraudulent income tax return on behalf of himself and his wife, wherein it was stated that their joint taxable income for the calendar year 1977 was $35,545 and that the amount of income tax due and owing thereon was the sum of $8,022, whereas, as he then and there well knew, their true joint taxable income for the said calendar year was the sum of $46,134 upon which there was due and owing to the United States of America an income tax of $12,648.

(Title 26, United States Code, Section 7201.)

COUNT FIVE

The Grand Jury further charges:

On or about March 31, 1979, in the Southern District of New York, RICHARD J. KNAPP, the defendant, who was employed as a unit manager by the National Broadcasting Company, Inc., New York, New York, did unlawfully, wilfully and knowingly make and subscribe a tax return which he verified by a written declaration that it was made under the penalties of perjury and which was filed with the United States Internal Revenue Service, which tax return he did not believe to be true, correct and complete as to every material matter in that the said tax return stated that the total income of Richard and Ilana Knapp was $30,782; whereas, as he then and there well knew, he received during the calendar year 1978 substantial other income, to wit, approximately $6,410 from false and fraudulent expense vouchers submitted by RICHARD J. KNAPP to the National Broadcasting Company, Inc.

(Title 26, United States Code, Section 7206(1).)

COUNT SIX

The Grand Jury further charges:

On or about March 31, 1979, in the Southern District of New York, RICHARD J. KNAPP, the defendant, who during the calendar year 1978 was married, did unlawfully, wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by himself and his wife to the United States of America for the calendar year 1978, by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed to the Internal Revenue Service a false and fraudulent income tax return on behalf of himself and his wife, wherein it was stated that their joint taxable income for the calendar year 1978 was $23,896 and that the

amount of income tax due and owing thereon was the sum of $3,744, whereas, as he then and there well knew, their true joint taxable income for the said calendar year was the sum of $30,306, upon which there was due and owing to the United States of America an income tax of $5,840.

(Title 26, United States Code, Section 2701.)

s/Ruth Harris
Foreperson

s/John S. Martin, Jr.
United States Attorney

APPENDIX B—JUDGMENT OF CONVICTION

United States District Court

United States of America
vs.
RICHARD J. KNAPP

Docket No. 81 Cr. 0543(LEM)

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date 1-12-82
WITH COUNSEL Leon Dicker, Esq.

PLEA—NOT GUILTY

FINDING AND JUDGMENT—There being a verdict of GUILTY.

Defendant has been convicted as charged of the offense(s) of unlawfully, wilfully and knowingly making and subscribing a tax return which he verified by written declaration that it was made under the penalties of perjury and which was filed with the Internal Revenue Service which tax return he did not believe to be true, correct and complete as to every material matter, as charged in Counts 1 and 3 (26 U.S.C. §7201[1]); and of unlawfully, wilfully and knowingly attempting to evade a large part of the income tax due and owing to the United States by preparing and causing to be prepared, signing and causing to be signed, and mailing and causing to be mailed a false and fraudulent income tax return as charged in Counts 2 and 4 (26 U.S.C. §7201).

SENTENCE OR PROBATION ORDER—The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) YEARS on each of COUNTS ONE, TWO, THREE, AND FOUR, pursuant to Title 18, U.S.C., §3651, as amended, with the provision that he be confined in a jail-type institution for a period of SIX (6) MONTHS, as provided in the aforesaid section.

Execution of the remainder of the prison sentence is SUSPENDED, and the defendant is placed on probation for a period of TWO AND ONE-HALF (2½) YEARS, to commence upon expiration of the period of confinement, subject to the standing probation order of this Court.

SPECIAL CONDITIONS—The defendant is FINED FIVE THOUSAND ($5,000.00) DOLLARS and the costs of prosecution on each of Counts One and Three, and FINED TEN THOUSAND ($10,000.00) DOLLARS and the costs of prosecution on each of Counts Two and Four.

ADDITIONAL CONDITIONS OF PROBATION—All the prison sentences, the fines, and the costs of prosecution are to run CONCURRENTLY with each other. Defendant is to stand committed until the total fine of TEN THOUSAND ($10,000.00) DOLLARS and the total costs of prosecution are paid, or he is otherwise discharged according to law.

Execution of sentence is STAYED pending appeal. Bail continued. In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side

of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and rescind probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

U.S. DISTRICT COURT
FILED
JAN 12 1982
S.D. OF N.Y.
s/ Lloyd F. MacMahon
Dated 1-12-82

APPENDIX C—UNREPORTED OPINION OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 23rd day of April, one thousand nine hundred and eighty-two.

PRESENT: HONORABLE LEONARD P. MOORE,
HONORABLE HENRY J. FRIENDLY,
HONORABLE THOMAS J. MESKILL,
Circuit Judges.

UNITED STATES COURT OF APPEALS
FILED
APR 23 1982
SECOND CIRCUIT
82-1010

UNITED STATES OF AMERICA,
Appellee,

v.

RICHARD J. KNAPP,
Defendant-Appellant.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

This is an appeal from a judgment entered after a jury trial in the United States District Court for the Southern District of New York, MacMahon, *C.J.*, convicting

Richard J. Knapp of two counts of making and subscribing a false federal income tax return, and two counts of tax evasion, 26 U.S.C. §§7201, 7206. Knapp was sentenced to four concurrent three-year terms of imprisonment, all but six months of each suspended, a subsequent two and one-half year term of probation, concurrent fines of $5,000 on each of the first two counts and $10,000 on each of the final two counts, and costs of prosecution. Knapp is at liberty pending this appeal.

Knapp raises five claims of error on appeal, all of which are without merit. The evidence, when viewed in the light most favorable to the government, *United States v. Losada*, slip op. 1645, 1654 (2d Cir. Mar. 12, 1982), is sufficient to support the jury's verdict. Indeed, Knapp all but concedes that the evidence was sufficient when he states: "The inference could be drawn [from the evidence presented] that Knapp kept the difference between [the amounts shown on the] vouchers and the amount of money actually paid to vendors doing business with NBC." Brief for Appellant at 10.

Knapp claims that the jury instructions were erroneous, unfair and prejudicial. Knapp has waived most of his claims with respect to the jury charge by failing to object at trial. Fed. R. Crim. P. 30. In any event, we believe that when taken as a whole, *see Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973), the jury charge was fair and complete.

Knapp next complains that he should have been allowed to elicit evidence that a defense witness who was charged with an offense similar to that for which Knapp was being tried and growing out of parallel circumstances had previously been acquitted. Knapp's theory of admissibility rests on a speculative claim that the jury may have drawn inferences undermining the credibility of this defense witness in the absence of evidence of his prior acquittal. The district court did not abuse its discretion in

ruling the proffered evidence inadmissible in the circumstances of this case. *See generally United States v. Sindona*, 636 F.2d 792, 800 (2d Cir. 1979), *cert. denied*, 451 U.S. 912 (1981); Fed. R. Evid. 403.

Because the government sought to establish Knapp's income tax violations by proving that he obtained specific items of unreported income rather than by inference from unexplained increases in his net worth, his claim based upon *Holland v. United States*, 348 U.S. 121 (1954), is inapposite. *See United States v. Falley*, 489 F.2d 33, 39-40 (2d Cir. 1973).

We have carefully reviewed Knapp's claim that the conduct of the trial judge demonstrated his bias in favor of the government and thus prejudiced the jury against it. A criminal defendant is guaranteed a fair trial, not a perfect one. *See United States v. Robinson*, 635 F.2d 981, 984 (2d Cir. 1980), *cert. denied*, 451 U.S. 992 (1981). While some of Judge MacMahon's comments during Knapp's trial "would better have been left unsaid," *id.* at 985, they were neither so many nor so prejudicial that Knapp was deprived of a fair trial.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of the district court is affirmed.

s/ Leonard P. Moore
Leonard P. Moore, U.S.C.J.

s/ Henry J. Friendly
Henry J. Friendly, U.S.C.J.

s/ Thomas J. Meskill
Thomas J. Meskill, U.S.C.J.

APPENDIX D—ORDER OF COURT OF APPEALS DENYING PETITION FOR REHEARING AND REHEARING EN BANC

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the ninth day of June, one thousand nine hundred and eighty-two.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RICHARD J. KNAPP,
Defendant-Appellant.

UNITED STATES COURT OF APPEALS
FILED
JUN 9, 1982
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT
No. 82-1010

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Richard J. Knapp,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

by: s/ Francis X. Gindhart
Francis X. Gindhart
Chief Deputy Clerk

APPENDIX E--ORDER OF COURT OF APPEALS DENYING MOTION FOR STAY OF ISSUANCE OF MANDATE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

-against-

RICHARD J. KNAPP,
Defendant-Appellant-Petitioner.

Docket Number 82 1010
NOTICE OF MOTION
for Stay of Issuance of Mandate, or its Recall
Pursuant to FRAP 41

MOTION BY:
LEON DICKER
400 Madison Avenue, New York, NY. 10017
(212) 421 3400
Has a request of opposing counsel for consent been refused? Yes.
Has service been effected? Yes.
Is oral argument desired? No.
Judge or agency whose order is being appealed: Judgment of Conviction

OPPOSING COUNSEL:
JOHN MARTIN, U.S.Atty., 1 St.Andrews Plaza, New York, N.Y. 10007 MICHAEL L. TABAK, AUSA 791 1941

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? No.

Would expedited appeal eliminate need for this motion? No.

If no, explain why not: Petition for Rehearing being filed simultaneously.

Brief statement of the relief requested: Stay of the issuance of mandate or its recall pending application for a Writ of Certiorari to the Supreme Court of the United States.

Previous requests for similar relief and disposition: None.

Statement of the issue(s) presented by this motion:
See supporting affidavit attached hereto. Also, see Petition for Rehearing and Rehearing en banc filed separately, but simultaneously with this motion.

Brief statement of the facts (with page references to the moving papers):
See supporting affidavit attached hereto. Also, see Petition for Rehearing and Rehearing en banc filed separately, but simultaneously with this motion.

Summary of the argument (with page references to the moving papers):
See supporting affidavit attached hereto. Also, see Petition for Rehearing and Rehearing en banc filed separately, but simultaneously with this motion.

Date May 6, 1982

s/ Leon Dicker
LEON DICKER
Attorney for Defendant-Appellant-Petitioner

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is denied.

s/ Leonard P. Moore by TJM
Leonard P. Moore, U.S.C.J. (by TJM)

s/ Henry J. Friendly
Henry J. Friendly, U.S.C.J.

s/ Thomas J. Meskill
Thomas J. Meskill, U.S.C.J.

Date June 10, 1982
UNITED STATES COURT OF APPEALS
FILED
JUN 10 1982
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

APPENDIX F—LETTER FROM CLERK OF SUPREME COURT DENYING APPLICATION FOR STAY

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

June 18, 1982

Leon Dicker, Esq.
400 Madison Avenue
New York, New York 10017

RE: Richard J. Knapp v. United States
No. A-1088

Dear Mr. Dicker:

Your application for stay in the above-entitled case was presented to Justice Marshall who has endorsed thereon the following:

"Application—Denied
Thurgood Marshall
6/18/82"

Very truly yours,

ALEXANDER L. STEVAS, Clerk

By s/ Christopher W. Vasil
Christopher W. Vasil
Deputy Clerk

rjb
cc: The Hon. Rex E. Lee
A. Daniel Fusaro, Esq., Clerk, US Court of Appeals for the Second Circuit (your No. 82-1010)

APPENDIX G—BILL OF COSTS TO BE INCLUDED IN JUDGMENT

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

REVISED BILL OF COSTS

UNITED STATES OF AMERICA,

vs.

RICHARD J. KNAPP,

Defendant.

81 Cr. 543 (LFM)
Civil Action File No.

Judgment having been entered in the above entitled action on the 12th day of January, 1982, against Richard J. Knapp, defendant, the clerk is requested to tax the following as costs:

BILL OF COSTS

**

Fees of the court reporter for all or any part of the transcript necessarily obtained for use in the case	$1,960.45
Fees for witnesses (itemized on reverse side)	7,199.78
Docket fees under 28 U.S.C. 1923	60.00
Total	$9,220.23

State of New York
County of New York ss.

I, Michael L. Tabak, Assistant United States Attorney, do hereby swear that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy hereof was this day served in hand, per prior agreement, to John L. Van Horne, III, Esquire, counsel to Richard J. Knapp.

Please take notice that I will appear before the Clerk who will tax said costs on June 21, 1982 at 10:00 a.m., per prior agreement.

Michael L. Tabak, AUSA
Attorney for United States of America

Consented to by Leon Dicker, for def. Richard J. Knapp

NOTE: SEE REVERSE SIDE FOR AUTHORITIES ON TAXING COSTS.

Witness Fees (computation, cf. 28 U. S. C. 1821 for statutory fees)

Name and Residence	Attendance		Subsistence		Mileage		Total Cost Each Witness
	Days	Total Cost	Days	Total Cost	Miles	Total Cost	
Joseph Torina, NY, NY	1	30.00				3.00	33.00
Richard Lynn, Miami, FL	3	90.00	3	184.00		343.00	617.00
Martin Gallagher, NY, NY	1	30.00				18.90	48.90
Michael Henry, High Point, NC	2	60.00	2	109.00		232.00	401.00
Charles Gilman, NY, NY	1	30.00				6.00	36.00
James Huie, Bristol, CT	5	150.00	4	218.00		437.28	805.28
Willie McCoy, Greensboro, NC	2	60.00	2	109.00		308.00	477.00
J.A. McKinney, Greensboro, NC	3	90.00	3	184.00		308.00	582.00
France Moise, NY, NY	1	30.00				3.00	33.00
Peggy Maness, Greensboro, NC	2	60.00	2	109.00		290.60	459.60
Janice Noel, Manchach, TX	2	60.00	2	109.00		336.00	505.00
James Noland, Edgewater, FL	3	90.00	3	184.00		308.00	582.00
Roy Regozin, NY, NY	1	30.00				3.00	33.00
Thomas Sammons, San Antonio, TX	3	90.00	3	184.00		330.00	604.00
Eva Trevino, Woodlands, TX	3	90.00	3	184.00		477.00	751.00
George Bachman, Austin, TX	3	90.00	3	184.00		342.00	616.00
Chester Kelley, Conroe, TX	3	90.00	3	184.00		342.00	616.00
					TOTAL		$7,199.78

Section 1924, Title 28, U.S. Code (effective September 1, 1948) provides:

"Sec. 1924. Verification of bill of costs."

"Before any bill of costs is taxed, the party claiming any item of cost or disbursement shall attach thereto an af-

fidavit, made by himself or by his duly authorized attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed."

See also Section 1920 of Title 28 which reads in part as follows:

"A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

The Federal Rules of Civil Procedure contain the following provisions:

Rule 54(d)

"Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but cost against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court."

Rule 6 (e)

"Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period."

Rule 58 (In Part)

"The entry of the judgment shall not be delayed for the taxing of costs."

EXHIBIT H—AFFIDAVIT OF RUTH LAUTERSTEIN

STATE OF NEW YORK
COUNTY OF NEW YORK

I, Ruth Lauterstein, being duly sworn deposes and say:

My feelings about the witness Torina were that it was obvious that he was "on the take". That he was worried and resentful—possibly fearful of prosecution himself. He had been fired which I felt was self explanatory. If I had known that he had been tried and acquitted before he testified it would have given his testimony more weight and influenced my verdict.

s/ Ruth Lauterstein

Sworn to before me
this 6th day of May 1982
s/ Leon Dicker
LEON DICKER
Notary Public, State of New York
No. 30-6022100
Qualified in Nassau County
Commission Expires March 30, 1984

APPENDIX I—AFFIDAVIT OF MAX CHARMAZ

STATE OF NEW YORK
COUNTY OF NEW YORK

I, Max Charmaz, being duly sworn, deposes and says:

In response to a question put to me by the attorney for Richard Knapp, I feel that if I had known that Joseph Torina had been tried and acquitted prior to his testifying in Knapp's trial I would have evaluated his testimony differently, which might have effected my verdict.

s/ Max Charmaz

Sworn to before me
this 4th day of May 1978
s/ Leon Dicker
LEON DICKER
Notary Public, State of New York
No. 30-6022100
Qualified in Nassau County
Commission Expires March 30, 1984

APPENDIX J—EXCERPT OF TRIAL COURT'S CHARGE TO THE JURY

So the key question here is not whether money entrusted to the defendant to be spent for NBC's purposes and benefit was voucherable or not voucherable, but whether the defendant spent or kept the money or part of it for his own use, benefit, purposes or personal gain. Thus, money received from NBC and kept for his own use and benefit or gain is taxable income; and this is so whether or not NBC allowed, sanctioned, ignored, or overlooked false or inflated vouchers or whether NBC was defrauded, foolish, careless, negligent, stupid or naive.

In other words, the government does not have to prove that the defendant stole or embezzled funds which belonged to NBC. The crimes charged here are not embezzlement or criminal misuse of NBC's money, but filing false tax returns and attempting to evade income taxes. All the government must prove beyond a reasonable doubt as far as receipt of income is concerned is that the defendant got money, that he kept it or used it for his own use, gain or benefit, that he knew he had additional income, substantial additional income, and that he wilfully filed a false return and wilfully attempted to evade his full and true income tax.

Now, income acquired unlawfully is just as taxable as lawful income. The tax law, in other words, doesn't care how a person gets his income. This may seem strange to you at first glance. But if you think about it, you will realize that it would be most unjust to relieve embezzlers from paying taxes on income acquired by their breach of trust, while requiring honest people to pay their taxes on almost every conceivable type of income.

Now remember that the defendant, Knapp, is not on trial for embezzlement. He is on trial for violating the federal tax law. You may find him guilty of violating those laws if you find that he wilfully understated his gross in-

come for the year in question by not reporting substantial income embezzled by him from NBC, through the submission of false and fraudulent expense vouchers.

Embezzlement, for our purposes, means that a person lawfully entrusted with the possession of money which belongs to another, knowingly and intentionally takes, misuses, diverts, converts or misappropriates the money for his own use, benefit or gain, against the interests, benefit and right of the true owners. So in this case, before the defendant can be found to have embezzled money or funds of his employer, NBC, it must appear beyond a reasonable doubt from the evidence that funds or money belonging to NBC came into the defendant's possession lawfully, because of his position of trust as a unit manager in NBC's sports division, and that the funds were knowingly and intentionally taken, diverted, converted or misappropriated by him for his own use, benefit, purposes or gain, against the interests and right of his employer, NBC, to the defendant's honest and faithful use of NBC's money and funds solely for its benefit, purpose and gain.

On this issue of embezzlement, the government contends that the evidence shows that NBC entrusted Knapp with money to be used for the benefit of NBC; but that Knapp unlawfully converted the money to his own use and benefit. In other words, that he kept or spent the money for himself or used it for his own purposes, with an intent to defraud NBC.

On the other hand, the defendant contends and testified that he spent the money solely for the benefit and purpose of NBC, keeping none of it for himself.

You heard all of the evidence in this case. It is for you to decide just where the truth lies on this key issue. Mere understatement of a large and substantial portion of his gross income, however, is not alone sufficient to constitute the crimes charged in Counts 1 and 3. Before the defendant can be convicted of those crimes, you must first find beyond a reasonable doubt that he knew and ***

Supreme Court, U.S.
FILED
SEP 24 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2391

In the Supreme Court of the United States

OCTOBER TERM, 1982

RICHARD J. KNAPP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

ROBERT E. LINDSAY
JOHN A. DUDECK, JR.
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion in excluding evidence of defense witness Torina's prior acquittal.

2. Whether the jury instructions were fair and complete.

3. Whether the trial court erred in permitting the government to cross-examine petitioner and his wife about their large cash expenditures and to introduce rebuttal testimony on this subject.

4. Whether the trial judge was fair and impartial in his conduct of the trial.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 4

Conclusion 13

TABLE OF AUTHORITIES

Cases:

Cupp v. *Naughten*, 414 U.S. 141 7

Davis v. *Alaska*, 415 U.S. 308 6

Glasser v. *United States*, 315 U.S. 60 11

Harper v. *United States*, 350 F. 2d 1000, cert. denied, 383 U.S. 951 5

Holland v. *United States*, 348 U.S. 121 ..... 8, 10

James v. *United States*, 366 U.S. 213 7

Perkins v. *United States*, 315 F. 2d 120, cert. denied, 375 U.S. 916 5

Quercia v. *United States*, 289 U.S. 466 13

Swallow v. *United States*, 307 F. 2d 81, cert. denied, 371 U.S. 950 ..... 9, 10

Taglianetti v. *United States*, 398 F. 2d 558, aff'd, 394 U.S. 316 10

United States v. *Aaron*, 190 F. 2d 144, cert. denied, 342 U.S. 827 11

Page

Cases—Continued:

United States v. *Crisp*, 435 F. 2d 354, cert. denied, 402 U.S. 947 11

United States v. *Curcio*, 279 F. 2d 681, cert. denied, 364 U.S. 824 11

United States v. *Davis*, 546 F. 2d 617 11

United States v. *Falley*, 489 F. 2d 33 11

United States v. *Kerley*, 643 F. 2d 299 4

United States v. *Londe*, 587 F. 2d 18, cert. denied, 439 U.S. 1130 10

United States v. *Nunan*, 236 F. 2d 576, cert. denied, 353 U.S. 912 10

United States v. *Price*, 623 F. 2d 587, cert. denied, 449 U.S. 1016 ..... 11, 13

United States v. *Robinson*, 635 F. 2d 981, cert. denied, 451 U.S. 992 ..... 11, 13

United States v. *Suskin*, 450 F. 2d 596 10

United States v. *Viserto*, 596 F. 2d 531, cert. denied, 444 U.S. 841 5

Statutes and rules:

Internal Revenue Code of 1954 (26 U.S.C.):

Section 7201 2
Section 7206(1) 1

Fed. R. Crim. P. 30 8

Fed. R. Evid. 403 6

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2391

RICHARD J. KNAPP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court did not issue a written opinion. The opinion of the court of appeals (Pet. App. 9a-11a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1982. A petition for rehearing was denied by the court of appeals on June 9, 1982 (Pet. App. 12a-13a). The petition for a writ of certiorari was filed on June 29, 1982.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts of filing false federal income tax returns for 1977 and 1978, in violation of 26 U.S.C. 7206(1), and two counts of willfully attempting to evade payment of

federal income taxes for 1977 and 1978, in violation of 26 U.S.C. 7201. Petitioner was sentenced to four concurrent three-year terms of imprisonment, with all but six months of each sentence suspended, to be followed by a probation term of two and one-half years (Pet. App. 6a-8a). In addition, he was fined $5,000 on each of the first two counts, $10,000 on each of the other two counts, and the costs of prosecution of all counts. The fines were concurrent with one another, resulting in a total fine of $10,000 (*id.* at 7a). The court of appeals affirmed petitioner's conviction (*id.* at 9a-11a).

1. The evidence at trial showed that during 1977 and 1978 petitioner was a unit manager for National Broadcasting Company assigned to network broadcasts at locations away from NBC's home base in New York (Tr. 15-16, 23). As a unit manager, petitioner was responsible for coordinating facilities and services needed for the production of television sports programs. Petitioner's duties included procuring goods and services for the television production crew, such as food, rental equipment, and scaffolding (Tr. 17). In anticipation of the need for immediate payment to some vendors, NBC provided petitioner with advances of cash and traveler's checks in amounts as large as $30,000 at a time (Tr. 20-21, 431; GX 6, 14). After a broadcast, petitioner was required to submit a voucher to NBC accounting for his cash expenditures (Tr. 22). The evidence showed that petitioner falsified his travel expense vouchers to cover up large amounts of cash that he retained and spent for his own purposes. Ten witnesses representing eight different vendors testified that petitioner paid them or their firms less than the amounts that petitioner had reported to NBC (*e.g.*, Tr. 77-83, 100-105, 120-121, 126-135). The total by which petitioner inflated his expenditures, based on the testimony of the vendor witnesses, was $10,589.97 in 1977 and $6,410.41 in 1978 (GX 30, 32). Petitioner failed to report any of this income on his federal tax returns (GX 20, 21).

The result was an understatement of tax due by $4,626.79 for 1977 and $2,096.00 for 1978 (Tr. 222-223; GX 31, 33).

2. Petitioner admitted that he had forged or inflated various receipts he had submitted to NBC with his expense vouchers (*e.g.*, Tr. 331, 362-363, 371, 433-434, 493-498, 549). He maintained that he had not used the inflated receipts for his own personal gain, but had incurred expenses in that amount on behalf of NBC (Tr. 439, 485). However, petitioner acknowledged on cross-examination that he had spent large amounts of cash during 1977 and 1978 that could not be traced to any bank account (*e.g.*, Tr. 538-539, 542, 544-547, 763; GX 801). The government demonstrated that the total of checks drawn to "cash" and the cash petitioner alleged he and his wife kept in a metal box was insufficient to cover the expenditures in question (Tr. 759-762, 793-796, 804-806).

3. Petitioner presented five claims of error on appeal, all of which the court of appeals found to be without merit. The court found the evidence sufficient to support the jury's verdict, noting that petitioner himself had conceded in his brief that the inference could be drawn that he had kept the difference between the amounts shown on the vouchers and the amounts actually paid to vendors (Pet. App. 10a). The court found that petitioner had waived most of his claims with respect to the jury charge by failing to object at trial, but that in any event the charge, when taken as a whole, was fair and complete (*ibid.*). The court of appeals concluded that the district court had not abused its discretion in excluding evidence of a prior acquittal of defense witness Torina, describing as "speculative" petitioner's claim that jurors might have drawn certain inferences concerning Torina's credibility (*id.* at 10a-11a). The court of appeals rejected petitioner's claim that the government should have followed special safeguards applicable to the net worth method of proof, since the government had used the specific

item method of proof (*id.* at 11a). Finally, the court of appeals concluded that the trial judge's comments during the course of the trial "were neither so many nor so prejudicial that [petitioner] was deprived of a fair trial" (*ibid.*).

Petitioner sought rehearing, urging the same arguments that he had previously presented. Petitioner produced two affidavits of jurors who stated that their verdicts might have been affected if they had known that defense witness Torina had been acquitted prior to his testimony at petitioner's trial (Petition for Rehearing and Rehearing en banc, Exhibits A and B). The court of appeals denied the petition for rehearing (Pet. App. 12a-13a).

ARGUMENT

The issues raised by the petition concern matters properly entrusted to the broad discretion of the trial court. The decision of the court of appeals reflects a correct application of settled law to the particular facts of the case and raises no question warranting this Court's review.

1. Petitioner contends (Pet. 6-8) that the trial court erred in precluding him from eliciting the fact that defense witness Joseph Torina, a former NBC unit manager, previously had been acquitted of criminal tax charges similar to those brought against petitioner. The trial court granted the government's pretrial motion to preclude such evidence, ruling that "[i]t is obviously wholly immaterial and designed to play on the sympathy of the jury" (Proceedings of Dec. 7, 1981, at 4). The court of appeals correctly concluded that the trial court's ruling was not an abuse of discretion (Pet. App. 10a-11a).

Proffered evidence of an acquittal, even of the defendant himself or a co-defendant, generally is excluded on the ground that it is not relevant to negate an inference of criminal conduct. See, *e.g.*, *United States* v. *Kerley*, 643 F. 2d 299, 300-301 (5th Cir. 1981) (noting that evidence of

a prior acquittal does not prove innocence, but only that the earlier prosecution failed to meet its burden of proving beyond a reasonable doubt at least one element of the crime); *United States* v. *Viserto*, 596 F. 2d 531, 537 (2d Cir.), cert. denied, 444 U.S. 841 (1979). Here Torina's acquittal, even if taken as an affirmative finding of innocence, could have had no bearing on petitioner's guilt or innocence, since petitioner and Torina received separate cash advances, submitted separate vouchers, and filed separate tax returns.

Petitioner contends (Pet. 7), however, that evidence of the acquittal should have been admitted to bolster Torina's credibility. Petitioner argues that jurors may have drawn the adverse inference that Torina, petitioner's former colleague, was about to face a trial on parallel charges, thus motivating Torina to testify falsely on petitioner's behalf in the hope that petitioner would reciprocate at Torina's trial.[1] The court of appeals correctly described this claim as speculative (Pet. App. 10a). Indeed, the government never suggested at trial that Torina had been indicted or that he ever was in any danger of prosecution, so that there was no apparent need to inform the jury of his acquittal. See, *e.g.*, *Harper* v. *United States*, 350 F. 2d 1000, 1001 (D.C. Cir. 1965), cert. denied, 383 U.S. 951 (1966) (upholding exclusion of favorable character evidence of witness's acquittal in case in which defense, not prosecution, had adduced evidence of his arrest and trial); *Perkins* v. *United States*, 315 F. 2d 120, 123 (9th Cir.), cert. denied, 375 U.S. 916 (1963) (upholding exclusion of evidence of witness's acquittal of crimes similar to those alleged against defendant, which had been offered by defense to establish witness's credibility).

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[1]Petitioner never advanced this theory at the trial and, thus, never afforded the trial court an opportunity to modify the ruling petitioner now challenges (Proceedings of Dec. 7, 1981, at 3-5; Tr. 634-635, 814).

Petitioner points to post-trial affidavits of two jurors (Pet. App. 23a-24a), which he submitted to the court of appeals with his petition for rehearing. Petitioner asserts that the affidavits show that the jury would have evaluated Torina's testimony differently if it had known that he had been acquitted. Apart from the manifest impropriety of reviewing an evidentiary ruling on the basis of post-trial and inherently speculative assertions by jurors regarding the possible effect of a different ruling, these affidavits shed no light on the correctness of the challenged ruling. Even assuming the evidence of Torina's acquittal might have had some influence on the jury's assessment of his credibility, this does not show that the influence would have been a proper one. Rule 403 of the Federal Rules of Evidence provides that even relevant evidence may be excluded if its probative value is substantially outweighed by danger of unfair prejudice, confusion of the issues, or misleading the jury. Here, the effect of testimony concerning the acquittal (which we submit was not relevant) would have been to invite the jury to speculate that, since Torina had been acquitted of the same crimes petitioner was then charged with, perhaps petitioner should be acquitted as well.[2] The court of appeals correctly concluded that the trial judge did not abuse his discretion in excluding evidence of the acquittal.[3]

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[2]In fact, petitioner's counsel suggested that Torina's acquittal would be used to argue that petitioner had been treated unfairly (Proceedings of Dec. 7, 1981, at 4).

[3]Petitioner cites *Davis* v. *Alaska*, 415 U.S. 308 (1974), as support for his contention that he should have been allowed to submit evidence of Torina's acquittal (Pet. 7-8). In *Davis* this Court held that the right of the accused to confront witnesses against him required that defense counsel be permitted to question the prosecution's key witness about his adjudication as a juvenile delinquent and his probation status at the time of the events about which he had testified, since such cross-examination might reveal possible biases or motivations of the witness. The present case is totally different from *Davis*. Torina was not an

2. Petitioner contends (Pet. 8-9) that the trial judge's instructions to the jury were erroneous and misleading because they included references to possible embezzlement by petitioner. There is no merit to this contention. The court of appeals correctly concluded that, when taken as a whole, "the jury charge was fair and complete" (Pet. App. 10a). See *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973).

The trial judge's references to embezzlement were not a central part of the jury charge, but merely formed a part of its explanation of the term "gross income." The trial judge explained to the jury that one of the issues it had to resolve was whether petitioner failed to report substantial gross income for 1977 or 1978. The judge properly defined the term "gross income" to include not only lawfully received income but also illegal income, such as stolen or embezzled money (Tr. 1011). See *James* v. *United States*, 366 U.S. 213 (1961). He further charged that the key issue on this point was whether petitioner had kept NBC funds for his own use or benefit (Tr. 1012). If he had not done so, he had to be acquitted (Tr. 1018). On the other hand, if he had converted NBC funds for his own personal use, the judge charged, it did not matter whether petitioner had obtained the funds without NBC's approval—which would constitute embezzlement—or with NBC's approval. In either event, the money was taxable income to petitioner if he kept it for his own use (Tr. 1012). The trial judge then defined embezzlement for the jury in a perfectly proper fashion (Tr. 1013-1014). The jury was reminded at several points that petitioner was not on trial for embezzlement and that the government was not required to prove that petitioner had embezzled (Tr.

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adverse witness, but rather was petitioner's own witness; thus, the right to confront an adverse witness is not at issue. Moreover, petitioner sought to introduce evidence of acquittal, not conviction.

1012-1013). The judge made no reference to embezzlement when he summarized the basic elements of the crimes charged (Tr. 1019-1025).

Since the case turned on whether petitioner had taken NBC funds for his own personal use, and since the government contended that he had done so by embezzling, it was clearly proper for the trial judge to refer to "embezzled funds" and to define embezzlement in the course of explaining "gross income." Any confusion that might have resulted from the limited references to embezzlement was eliminated by the judge's clear instruction that petitioner was on trial for violations of federal tax law, not for embezzlement (Tr. 1012-1013). Moreover, the judge repeatedly instructed the jury that petitioner's basic defense was that he had spent the money solely for the benefit of NBC and had kept none of it for himself (Tr. 1014, 1016, 1018, 1022). Petitioner does not contend that these instructions did not fairly and accurately present the defense theory to the jury. There is no question that, taken as a whole, the jury charge was fair and complete.[4]

3. Petitioner argues (Pet. 10-11) that the trial court erred in permitting the government to cross-examine him and his wife about their large cash expenditures during 1977 and 1978 without following the procedures set forth in *Holland* v. *United States*, 348 U.S. 121 (1954). In *Holland*, this Court held, *inter alia*, that if the government chooses to prove income tax evasion by means of the "net worth" method, *i.e.*, by comparison of a taxpayer's reported taxable

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[4]Although the trial judge specifically requested that counsel submit requests to charge on the subject of embezzlement (Tr. 580-581), petitioner did not submit such a request (Tr. 673). Following the jury charge, petitioner's counsel objected to the court's embezzlement charge, but failed to state the ground for the objection (Tr. 1028). See Fed. R. Crim. P. 30.

income with his increase in net worth plus his non-deductible expenditures, it must lay a foundation by establishing the taxpayer's net worth at the beginning of the period in question. In this case, however, the government established violations by proving that petitioner obtained specific items of unreported income, *i.e.*, excess cash retained through submission of falsified expense vouchers, rather than by inferences based upon unexplained increases in his net worth. See *Swallow* v. *United States*, 307 F. 2d 81 (10th Cir. 1962), cert. denied, 371 U.S. 950 (1963). Because this was not a "net worth" case, this Court's holding in *Holland* is inapposite.

Contrary to petitioner's contention (Pet. 10-11), the government did not change its "specific item" case into a "net worth" case by its cross-examination of petitioner and his wife at the trial. The government's direct case consisted of proof of specific items of unreported income received by petitioner. However, when petitioner took the witness stand in his own defense, he testified that the excess cash reflected on the inflated vouchers was used for NBC's purposes and not for his own personal benefit (Tr. 439, 485, 527, 542). To impeach this testimony, the government elicited admissions from petitioner and his wife that they had made unusually large cash payments for personal items in situations in which most people would have paid by check.[5] Petitioner

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[5]The record shows that during 1977 and 1978 petitioner paid for the following items in cash: $14,000 to $15,000 for his own film company; a portion of approximately $11,000 spent for home furnishings; some portion of the expenses incurred during a trip to Bimini; and some portion of a $12,000 down payment on a vacation house (Tr. 533-535, 541-542, 544-547, 790-796, 804-805). Testimony concerning these large cash expenditures also was relevant to the issue of petitioner's willfulness in failing to report income, since the jury could have inferred that petitioner engaged in large currency transactions in order to avoid leaving evidence of unreported income.

responded by claiming that the cash had not come from NBC advances, but from bank accounts and from a cash hoard kept in a metal box (Tr. 535-547, 774-775, 787-788, 794-796). The government then countered that testimony by demonstrating that the total of checks drawn to "cash" and the alleged amounts in the cash hoard were insufficient to cover the expenditures in question (Tr. 759-762, 793-796, 804-806).

The government proved its direct case by establishing specific items of unreported income. The only injection of "net worth" issues came from petitioner's own testimony concerning what he did with the cash available to him. The government then was fully entitled to set the record straight. In doing so the government was not required to employ the special safeguards that are imposed when it bases its direct case on the net worth approach.[6] The court of appeals correctly rejected petitioner's challenge on this point.

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[6]This Court in *Holland* was concerned with cases in which the government seeks to prove tax evasion solely or primarily on the basis of a net worth analysis. In such cases it may be difficult for the taxpayer to refute the circumstantial evidence presented by the prosecution. 348 U.S. at 129. Courts have declined to impose the "exceptional safeguards" set out in *Holland* in cases that are not based solely on the net worth method. See, *e.g.*, *United States* v. *Suskin*, 450 F. 2d 596, 598 (2d Cir. 1971) (*Holland* safeguard need not have been applied where government's method of proof was by specific item); *Taglianetti* v. *United States*, 398 F. 2d 558, 564-566 (1st Cir. 1968), aff'd, 394 U.S. 316 (1969) (declining to require strict adherence to *Holland* safeguards even when government had used the cash expenditure method of proof, a variation on the net worth method); *Swallow* v. *United States*, *supra*, 307 F. 2d at 84 (reasons for application of *Holland* safeguards are not present in "specific item" case); *United States* v. *Nunan*, 236 F. 2d 576, 585-586 (2d Cir. 1956), cert. denied, 353 U.S. 912 (1957) (*Holland* safeguard not required in non-net-worth case, even though evidence of cash expenditures had been introduced). See also *United States* v. *Londe*, 587 F. 2d 18, 20 (8th Cir. 1978), cert. denied, 439 U.S. 1130 (1979). Moreover, courts have not imposed such safeguards in admitting evidence of large cash expenditures by defendants in non-tax cases, in which such evidence constitutes only part of the overall proof of a

4. Finally, petitioner contends (Pet. 12) that the trial judge deprived him of a fair trial by asking questions and making comments that damaged the credibility of petitioner and other defense witnesses. The record as a whole does not bear out this charge.

A federal judge "is more than a moderator or umpire and has an active responsibility to see that a criminal trial is fairly conducted." *United States* v. *Curcio*, 279 F. 2d 681, 682 (2d Cir.), cert. denied, 364 U.S. 824 (1960). Thus, a judge has the power and the responsibility to elicit the truth through the interrogation of witnesses. *Glasser* v. *United States*, 315 U.S. 60, 82 (1942). Indeed, the judge may even express his opinion on the weight of the evidence and the credibility of the witnesses, so long as he makes clear that the jury is in no way bound by such observations. See *United States* v. *Davis*, 546 F. 2d 617, 622 (5th Cir. 1977); *United States* v. *Aaron*, 190 F. 2d 144, 146-147 (2d Cir.), cert. denied, 342 U.S. 827 (1951). Of course, the trial judge must also maintain impartiality and a courtroom atmosphere in which guilt or innocence may be fairly tested. See *Glasser* v. *United States, supra*, 315 U.S. at 82-83; *United States* v. *Price*, 623 F. 2d 587, 593 (9th Cir.), cert. denied, 449 U.S. 1016 (1980).

It is necessary to examine the record as a whole in order to determine whether the trial judge's participation affected petitioner's substantial rights. *Glasser* v. *United States, supra*, 315 U.S. at 83. The trial in this case consumed six trial days and more than one thousand pages of transcript.

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crime involving a motive of financial gain. See, *e.g.*, *United States* v. *Falley*, 489 F. 2d 33, 39-40 (2d Cir. 1973) (distinguishing net worth tax fraud cases on the ground that the government relies exclusively on inference drawn from financial evidence in such cases); *United States* v. *Crisp*, 435 F. 2d 354, 360 (7th Cir. 1970), cert. denied, 402 U.S. 947 (1971); *United States* v. *Robinson*, 635 F. 2d 981, 987 (2d Cir. 1980), cert. denied, 451 U.S. 992 (1981).

Not only were the trial judge's interjections relatively few and far between, but, as petitioner's own illustrations reveal (Pet. 12-14), they generally were geared toward insuring that witnesses were responsive to questions asked by counsel.[7] The trial judge carefully instructed the jury that none of his rulings or questions was to be interpreted as indicative of his opinion concerning the guilt or innocence of the petitioner and that this matter was the responsibility of the jury only (Tr. 994). Moreover, the strength of the evidence of petitioner's guilt renders harmless any error that might have

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[7]The examples cited by petitioner are taken out of context, as he concedes (Pet. 12). One example suggests the motivation underlying the occasional intervention by the trial judge. Petitioner and defense witness Koiv testified at trial that they had to inflate their receipts to receive credit for "non-voucherable" expenditures they purportedly had made on NBC's behalf (Tr. 248-274, 352-358, 372-375). They contended that there were many types of expenditures that NBC wanted and expected them to make, such as payment for liquor and entertainment, but which they were not allowed to list explicitly on their vouchers (Tr. 256, 261, 418, 423). NBC management allegedly knew and approved of the forging and inflating of receipts to cover such "non-voucherable" expenditures (Tr. 248-249, 470-471). The record shows, however, that the types of expenditures that petitioner described as "non-voucherable" were in fact routinely accepted for payment by NBC (Tr. 504-529). The questions and comments reproduced in the petition (at 12-13) represent an understandable attempt by the judge to clarify this important testimony for the jury.

Petitioner complains (Pet. 14) that the trial judge showed bias by making thirty sua sponte rulings which precluded questioning by defense counsel and only five such rulings against the prosecution. This fact standing alone does not show bias. Rather, the record reveals that the disparity resulted not from any partiality on the part of the judge, but from the more frequent asking of objectionable questions by petitioner's counsel. In addition, petitioner fails to note the instances in which the judge expressed displeasure at government witnesses and at the prosecution (*e.g.*, Tr. 40, 41, 94-95, 237, 712, 715, 887). The judge treated both sides even-handedly and gave petitioner the benefit of significant discretionary rulings (Tr. 228, 766, 884-885, 911).

occurred.[8] See *United States* v. *Robinson*, 635 F. 2d 981, 986 (2d Cir. 1980), cert. denied, 451 U.S. 992 (1981); *United States* v. *Price, supra*, 623 F. 2d at 593.

The court of appeals carefully reviewed petitioner's claim and concluded that, while some of the trial judge's comments would better have been left unsaid, they were "neither so many nor so prejudicial that [petitioner] was deprived of a fair trial" (Pet. App. 11a). That conclusion is clearly correct, and no further review is warranted.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8]As the court of appeals noted (Pet. App. 10a), petitioner all but conceded that the evidence was sufficient to support the jury's verdict.

[9]There is no basis for petitioner's contention (Pet. 12) that the decision below conflicts with *Quercia* v. *United States*, 289 U.S. 466 (1933). In *Quercia*, this Court held that the trial judge's instruction to the jury that the defendant's wiping his hands while testifying was "an indication of lying" constituted reversible error. Petitioner points to nothing in the present case that even approaches the instruction at issue in *Quercia*.

DOJ-1982-09